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March 31, 1997

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

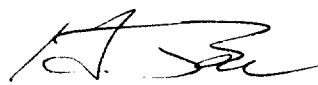
RE: Eternal Word Television Network, Inc.
Reply Comments in MM Docket No. 95-176
Closed Captioning and Video Description
of Video Programming

Dear Mr. Caton:

Transmitted herewith on behalf of Eternal Word Television Network, is an original and four (4) copies of its Reply Comments in the above-referenced proceeding.

Should any questions arise in connection with this matter, please contact the undersigned.

Respectfully submitted,


Howard J. Barr

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Before the
FEDERAL COMMUNICATIONS COMMISSION
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MAR 31 1997

**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY**

In the Matter of)

Closed Captioning and Video)
Description of Video Programming)

Implementation of Section 305)
of the Telecommunications Act)
of 1996)

MM Docket No. 95-176

Video Programming Accessibility

REPLY COMMENTS OF ETERNAL WORD TELEVISION NETWORK

ETERNAL WORD TELEVISION NETWORK

Howard J. Barr
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March 31, 1997

TABLE OF CONTENT

SUMMARY	-i-
INTRODUCTION	-1-
EXEMPTIONS FOR CERTAIN CLASSES OF PROGRAMMERS ARE NECESSARY AND APPROPRIATE	-2-
AN EXEMPTION FOR NON-PROFITS IS APPROPRIATE	-6-
THE COMMISSION SHOULD ADOPT A STREAMLINED PROCESS FOR CONSIDERATION OF WAIVER REQUESTS	-9-
NO CLOSED CAPTIONING REQUIREMENT SHOULD APPLY TO LIBRARY PROGRAMMING THAT WILL NOT BE SHOWN	-11-
CONCLUSION	-12-

SUMMARY

Eternal Word Television Network ("EWTN"), by counsel and pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, hereby submits its Reply Comments in the above-captioned proceeding.

While EWTN supports the notion of maximizing the hearing impaired's accessibility to video programming through closed captioning, EWTN submits that the Commission should consider establishing an exemption for non-profit programmers for whom closed captioning will be a significant economic burden. That, rather than any technical ability to close caption programming, should establish the parameters for the grant of exemptions. EWTN demonstrates the severe economic impact closed captioning will have on its operations.

EWTN also supports the adoption of clear and concise rules establishing a network's eligibility for a waiver from the Commission's rules. With minor modifications, EWTN supports Media Captioning Services' proposal that a weighted average be used.

Finally, EWTN supports the National Cable Television Association's position against requiring captioning of library programming that will not be shown. No public interest benefit is gained by the captioning of such programming.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Closed Captioning and Video
Description of Video Programming

Implementation of Section 305
of the Telecommunications Act
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MM Docket No. 95-176

Video Programming Accessibility

REPLY COMMENTS OF ETERNAL WORD TELEVISION NETWORK

Eternal Word Television Network ("EWTN"), by counsel and pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, hereby submits its Reply Comments in the above-captioned proceeding.^{1/} The following is shown in support thereof:

I. INTRODUCTION

America's largest religious cable network, EWTN is a non-profit organization providing programming from a Catholic perspective to 1,500 affiliates reaching over fifty million homes. EWTN's 24-hour programming includes telecasts of religious services, as well as thought provoking documentaries, children's programming, informative talk shows on moral and social issues and other programs and specials of interest to those concerned with America's spiritual life. EWTN's high-quality programming, provided in both English and Spanish, is available to cable operators via satellite free of charge.

^{1/} Closed Captioning and Video Description of Video Programming, Notice of Proposed Rulemaking (NPRM), FCC 97-4, released January 17, 1997.

II. EXEMPTIONS FOR CERTAIN CLASSES OF PROGRAMMERS ARE NECESSARY AND APPROPRIATE

EWTN, in general, supports the notion of maximizing the hearing impaired's accessibility to video programming through closed captioning. But, though well established, the Commission's closed captioning proposal poses serious economic consequences for EWTN and, presumably, for other non-profit networks. The commenters in this proceeding appropriately recognize the Commission's broad authority under § 713^{2/} to "exempt by regulation programs, classes of programs or services" based upon the economic burden captioning requirements would place on the programmer and the need for the adoption of exemptions in appropriate instances. E.g., Comments of The A&E Television Networks, The History Channel and Ovation ("A&E"); Comments of Outdoor Life Network, Speedvision Network, The Golf Channel, BET on Jazz and America's Health Network ("Start-up Commenters").

The Commission's tentative conclusion not to create any blanket exemptions simply because "all classes of providers appear to have the technical ability to deliver closed captioning ..." misses the point. NPRM, FCC 97-4 at ¶ 85. The issue is not technical ability, but rather, the "economic burden[]" to the provider or owner of such programming." Section 713(d)(1) of the Communications Act, as amended, 47 U.S.C. § 613(d)(1). The Commission's conclusion ignores not only § 713(d)(1)'s plain language, but Congress' explicit recitation of some of the factors to be considered, to wit:

When considering exemptions under paragraph (d)(1), the Commission shall consider several factors, including but not limited to: (1) the nature and cost of

^{2/} Section 713(d) of the Communications Act, as amended, 47 U.S.C. § 613(d).

providing closed captions; (2) the impact on the operations of the program provider, distributor, or owner (3) the financial resources of the program provider, distributor, or owner and the financial impact of the program; (4) the cost of the captioning considering the relative size of the market served or audience share; (5) the cost of the captioning, considering whether the program is locally or regionally produced and distributed; (6) the non-profit status of the provider; and (7) the existence of alternative means of providing access to the hearing impaired, such as signing.

Conf. Report 104-458, 104th Cong. 2d Sess. 183 (1996) (emphasis added).

While the Commission is perhaps not required to establish exemptions, failure even to consider establishing exemptions by regulation -- or worse yet, to focus on one factor to the complete exclusion of those factors that Congress mandated the Commission to consider -- runs contrary to the Act. See Morton v. Ruiz, 415 U.S. 199, 231, 94 S.Ct. 1055, 1072 (1974) ("[t]he power of an administrative agency to administer a congressionally created ... program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress"). In light of the Act's plain language (and legislative history), the Commission's conclusion is tantamount to an abdication of that responsibility.

A&E well details the economic burden closed captioning will impose on cable programmers. A&E Comments at 10-15. Its call for the Commission to take into account the significant differences in scale and resources between broadcast and cable networks and to adopt rules taking these differences into account is sound advice.

But the Commission should consider not only those differences, but the differences between cable networks and adopt rules taking those differences into account as well. See Comments of Start-up Commenters. For example, unlike A&E and the Start-up

Commenters, EWTN is a non-profit organization and enjoys neither advertising revenue nor subscriber fees from its affiliates.

Rather, EWTN, as most likely are numerous other non-profit programmers, is supported by charitable contributions from its viewers. As great an impact closed captioning requirements will have on the likes of the A&Es and the Start-up Commenters of the industry, that impact will be significantly greater upon the non-profit networks of the industry.

For example, EWTN's 1995 audited financial statements (its most recent) show contributions of \$15,304,373, but expenses for that same period totalling \$16,035,551. Its actual production and programming expenses for this same period were \$843,312.

EWTN currently produces and airs approximately 500 hours of new prerecorded programming each year and approximately 700 hours of live unscripted programming. Based upon the Commission's estimates,^{3/} EWTN would incur between \$121,000 and \$522,500 (or between 14.3% and 62% of its production and programming expense) in order to meet the 25% threshold; \$242,000 and \$1,045,000 (or between 28.7% and 172% of its production and programming expense) in order to meet the 50% threshold; 363,000 and \$1,567,500 (or between 43% and 186%) in order to meet the 75% threshold; and \$484,000 and 2,090,000 (or between 57.4% and 248% of its production and programming expense) in order to meet the 100% threshold. Based on quotes EWTN has received, it would incur an additional \$530,000 (or 62.8% of its production and programming expense) to meet the 25% threshold; \$1,060,000 (or 126% of its

^{3/} NPRM, FCC 97-4 at ¶¶ 18 - 20.

production and programming expense) to meet the 50% threshold; \$1,590,000 (or 189% of its production and programming expense) to meet the 75% threshold; and \$2,120,000 (or 251% of its production and programming expense) to meet the 100% threshold.

In short, regardless of whose estimates are used, closed captioning will not only add significantly to EWTN's programming expenses, but will likely shortly equal and far exceed those expenses. EWTN, of course, is unable to offset this massive increase in its costs through advertising and subscriber revenue and can hardly expect viewer donations to make up the difference.

As the National Cable Television Association ("NCTA") and A&E note, closed captioning has progressed to where it is today with generous governmental support, directed largely toward the broadcast networks. Not only is the continued availability of that source of funding in question, but entities such as EWTN are likely ineligible to share in such funding, further exacerbating the economic burden that religious non-profit programmers such as itself will experience as a result of a closed captioning requirement. The ability of religious programmers such as EWTN to forge partnerships for the underwriting of closed captioning as have the broadcast networks is also subject to question.

No doubt other non-profits are faced with the same scenario. The Commission's proposed ten year phase in schedule does little toward ameliorating the financial impact the Commission's closed captioning requirements will have on EWTN and others like it.

III. AN EXEMPTION FOR NON-PROFITS IS APPROPRIATE

The Act supports grant of an exemption in the case of non-profit programmers under the economic harm analysis Congress mandated. Conf. Report 104-458, 104th Cong. 2d Sess. at 183. As much as the creation of an exemption tied directly to the number of subscribers is of a type Congress intended when it gave the Commission express authority to establish exemptions,^{4/} so too is the creation of an exemption tied to non-profit entities facing the above-described economic realities. Congress' direction to the Commission bears repeating:

When considering exemptions under paragraph (d)(1), the Commission shall consider several factors, including but not limited to: (1) the nature and cost of providing closed captions; (2) the impact on the operations of the program provider, distributor, or owner (3) the financial resources of the program provider, distributor, or owner and the financial impact of the program; (4) the cost of the captioning considering the relative size of the market served or audience share; (5) the cost of the captioning, considering whether the program is locally or regionally produced and distributed; (6) the non-profit status of the provider; and (7) the existence of alternative means of providing access to the hearing impaired, such as signing.

Conf. Report 104-458, 104th Cong. 2d Sess. 183 (emphasis added).

EWTN urges the Commission to exempt by regulation, as a class, all non-profit networks as closed captioning will clearly be economically burdensome for such networks. Such an exemption is appropriate under the circumstances and is of a type Congress intended when it gave the Commission express authority to establish exemptions.

^{4/} Start-up Commenters at p. 33.

Alternatively, assuming a reticance on the Commission's part to establish such a broad exemption, EWTN suggests that the Commission exempt by regulation all non-profit networks that have not operated on at least a break even basis in any one of five years preceding the effectiveness of the Commission's Rules or for which closed captioning costs are estimated to equal or exceed 25% of the programming budget in any one of the phase in periods. Closed captioning will clearly be economically burdensome to non-profit networks falling within such guidelines.

The Start-up Commenters well emphasized the public interest benefits to be gained by appropriately adopted exemptions:

On the one hand, the exemption will eliminate the possibility that [non-profit networks] will be forced to reduce the quality or quantity of their programming in order to fund closed captioning. At the same time, it will eliminate the incentive of MVPDs not to carry [non-profit networks] that are not yet able to bear the costs of captioning.

Start-up Commenters Comments at p. 36. Moreover, the creation of exemptions by regulation should save scarce administrative resources by minimizing the need for the Commission to consider the potentially numerous and time consuming requests for exemptions under § 713(d)(3) of the Act.

Like the Start-up Commenters, EWTN does not propose a permanent or indefinite exemption, but rather, additional time in which to prepare for closed captioning's rigorous financial requirements. EWTN proposes an exemption for a six year period beginning with the effective date of the Commission's rules. This proposal is consistent with the NCTA's suggestion that start-up networks be granted a five year exemption. NCTA Comments at pp. 19-20.

At the conclusion of the exemption period, the non-profit network would no longer be exempt (unless it could establish that compliance would pose an "undue burden" through the Commission's waiver process) and would be subject to the phase in requirements. EWTN further suggests that the proposed alternative ten year period is more appropriate, i.e., non-profits no longer exempt from the rules would be required to caption 25% of programming within three years; 50% at the end of five years; 75% at the end of seven years; and 100% at the end of ten years. This will better enable non-profits to cope with closed captioning's financial requirements.

Relatedly, the Commission should reject the National Council on Disability's suggestion that the institution of a shorter phase-in period "need not result in any hardship for a program provider"^{5/} because of the Commission's ability to grant waivers in individual cases. This suggestion ignores the likelihood that an even shorter implementation period would result in an even greater number of waiver requests. This will result in a further drain on the Commission's resources and greater uncertainty in the industry.

The Commission should take this opportunity to adopt clear and concise rules, including appropriate exemptions, that are reflective of marketplace realities, including the non-profit status of programmers, and that seek to avoid the need, as far as possible, for waivers in individual cases.

^{5/} Comments of National Council On Disability at p. 2.

IV. THE COMMISSION SHOULD ADOPT A STREAMLINED PROCESS FOR CONSIDERATION OF WAIVER REQUESTS

Insofar as individual waivers are concerned, the Commission should adopt clear and concise rules that provide guidance to potential waiver applicants as to their eligibility for a waiver. Such rules will allow potential waiver applicants to assess their eligibility for a waiver in the first instance and will allow them to better tailor their waiver requests -- or to possibly avoid needless expense in the pursuit of a waiver that will likely never be granted.

Such rules will not only minimize the cost and expense potential waiver and waiver applicants alike will have to expend in the pursuit of a waiver, but will also minimize Commission devotion of already scarce administrative resources to the processing of waiver requests. As mentioned above, the grant of exemptions in appropriate instances, such as proposed by the Start-up Commenters and by EWTN, will also minimize Commission devotion of resources to the processing of waiver requests since networks falling within those classes will not be faced with the need to pursue waivers.

Serious consideration should be given to Media Captioning Services suggestion that the Commission use a weighted average ranking system in determining whether a waiver is warranted. Comments of Media Captioning Services at pp. 6-7. The proposal is clear and concise and readily establishes a network's eligibility for a waiver. The proposal minimizes costs and expenses the waiver applicant might otherwise incur as well as those the Commission might otherwise expend in its evaluation of the request.

Media Captioning's proposal, however, fails to adequately take non-profit networks into account. The proposal could be modified by placing all non-profit networks

into category (e) under the market served variable and by placing such networks into the 3 million or less gross annual revenues category under the financial resources variable.

As Media Captioning suggests, waiver requests submitted in accordance with its plan lend themselves to being processed much the same way the Commission processes open video system certifications. Implementation of Section 302 of the Telecommunications Act of 1996 -- Second Report & Order in CS Docket No. 96-46), 3 CR 196, 218 ¶ 34 (1996). Applicants should be required to submit their filings on paper as well as on computer diskette (or electronically), after which the Commission should issue a public notice of the filing and place a copy on its web site.

The thirty day public notice period Media Captioning suggests is more than sufficient. Within that period, interested parties would have the opportunity to comment on or oppose the filing pursuant to a ten day deadline; the waiver applicant would have the opportunity to respond within five days thereafter. Any filing not disapproved by the Commission by the conclusion of the thirty day public notice period should be deemed approved. Alternatively, the Commission should consider implementing the ten day time frame employed in the review of open video system certifications. Id.

EWTN suggests that the submission be based on the waiver applicant's most recent audited financial statement, making the information supporting the waiver readily verifiable. Given that the truth and veracity of the information set forth in the request would be attested to under penalty of perjury, no real need exists for the financial statement to be submitted with the request. This is not to suggest that the process would not require "purposeful representations" regarding the applicant's qualifications

and, as in the open video system certification process, the Commission should be free to "require other information, if necessary (including a copy of the applicant's audited financial statement), to determine compliance with the Commission's rules." Id at p. 217, ¶ 31.

**V. NO CLOSED CAPTIONING REQUIREMENT SHOULD APPLY TO
LIBRARY PROGRAMMING THAT WILL NOT BE SHOWN**

EWTN concurs with the NCTA's request that the Commission clarify that any captioning requirements applicable to library programming should "apply only to such programs if they are aired subsequent to the rules' effective date -- and not to all programming (including archival programming) sitting on library shelves." NCTA Comments at 28, n. 58. EWTN, for example, maintains an extensive archival library of programming which it does not license for use by third parties and which, for the most part, it does not intend to air in the future. Not only is there no requirement for the captioning of programming that is not shown, but no public interest benefit is gained by requiring the captioning of such programming.

CONCLUSION

Wherefore, the premises considered, Eternal Word Television Network respectfully requests that the Commission consider its Reply Comments in the course of this proceeding.

Respectfully submitted,

ETERNAL WORD TELEVISION NETWORK

By 

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